

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

Civil Action No. 3:12-cv-487-MOC-DCK

DAVID HOLMES, HERTA S.)
THEBERGE, MARGUERITE K.)
POTTER, and the MARGUERITE K.)
POTTER REVOCABLE TRUST,)
individually and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

BANK OF AMERICA, N.A., in its own)
capacity and as successor by merger to)
BAC HOME LOANS SERVICING, L.P.,)
SEATTLE SPECIALTY INSURANCE)
SERVICES, INC., in its own capacity)
and as successor in interest to)
COUNTRYWIDE INSURANCE)
SERVICES, INC., ILLINOIS UNION)
INSURANCE COMPANY, and)
CERTAIN UNDERWRITERS AT)
LLOYD'S LONDON, including all)
underwriters who underwrote force-placed)
wind insurance policies for Bank of)
America, as the insured during the)
applicable limitations period and)
LLOYD'S, UNDERWRITERS, AT)
LONDON)

Defendants.)

**DEFENDANTS CERTAIN
UNDERWRITERS' MOTION
TO DISMISS FIRST AMENDED
COMPLAINT FOR FAILURE TO
STATE A CLAIM AND FOR
LACK OF SUBJECT-MATTER
JURISDICTION**

NOW INTO COURT, through undersigned counsel, come Defendants named as “Certain Underwriters at Lloyd’s, London including all underwriters at Lloyd’s London who underwrote force-placed wind insurance policies for Bank of America as the insured during the applicable statute of limitations period” (hereinafter, “Certain Underwriters”), which respectfully move that this Court dismiss Plaintiffs’ claims against them with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). As set forth more fully in the attached Memorandum in Support, which is incorporated herein by reference, Plaintiffs have failed to state a claim for unjust enrichment upon which relief can be granted because they have failed to specify the applicable state law. In the alternative, Plaintiffs have failed to state a claim for unjust enrichment because Plaintiffs did not directly confer a benefit on Certain Underwriters. Moreover, in the alternative, Plaintiffs offer no facts that support their assertion that Certain Underwriters’ retention of any such benefit would be unjust—and the terms of the Policy show that such facts could not be alleged. Finally, and also in the alternative, Plaintiffs’ unjust enrichment claim may not proceed because of their contractual claims based on the same subject matter.

Certain Underwriters also move this Court to dismiss Plaintiffs’ claims against them with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1) based on lack of subject-matter jurisdiction under Article III of the United States Constitution. Plaintiffs lack standing to the extent they assert claims against Syndicates at Lloyd’s other than those subscribing to the Policy under which coverage was provided for Plaintiff Theberge’s property.

WHEREFORE, Certain Underwriters respectfully request that the Honorable Court grant their motion and dismiss the claims asserted against Certain Underwriters in Plaintiffs’ First Amended Complaint [D.E. 40] with prejudice, at Plaintiffs’ cost, and grant such other and further relief as the Court deems proper.

Respectfully submitted this 31st day of December, 2012.

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s/ Kevin M. O'Brien

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Attorney for Defendants Named as "Certain Underwriters at Lloyd's, London including all underwriters at Lloyd's London who underwrote force-placed wind insurance policies for Bank of America as the insured during the applicable statute of limitations period"

CERTIFICATE OF SERVICE

I certify that, on this 31st day of December, 2012, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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